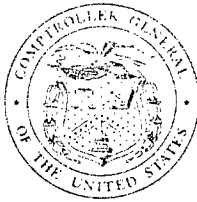


DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-196755

DATE: April 10, 1980

MATTER OF: Comtech Laboratories

4749

DIGEST:

[Protest Alliging]

Allegations of impropriety in RFP] which was apparent prior to closing date for receipt of initial proposals, and of impropriety in RFP amendment, are untimely under section 20.2(b)(1) of GAO's Bid Protest Procedures and thus are dismissed, since protest was not filed until after best and final offers were due.

Comtech Laboratories (Comtech) protests certain matters with respect to request for proposals (RFP) No. N00039-79-R-0028(Q) issued by the Department of the Navy for 42 AN/TRC-97A Radio Sets for the Air Force. Comtech contends that by requiring first-time producers to submit a first article test report for approval only 1 month before the scheduled delivery of the entire 42 production units, while restricting progress payments to 60 percent of the contract price pending first article approval, the Navy effectively created a sole-source procurement from the only prior producer in the competition (who presumably would have the first article requirement waived if awarded the contract). Comtech also protests that the RFP was ambiguous with respect to whether the Government or the contractor would be responsible for the cost and delivery schedule impact of revising certain Government-furnished drawings.

The record developed in response to the protest as set out below discloses that the protest is untimely under our Bid Protest Procedures, 4 C.F.R. part 20 (1979) (Procedures). Therefore, it will not be considered on the merits.

The record shows that the evidently complex radio sets, which are used to control communications links in the tactical command, were in "critically" short

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supply when the procurement was initiated. Although it was originally planned to solicit only prior producers, the Navy decided to synopsise the requirement in the Commerce Business Daily after receiving indications of interest from a number of other firms. The RFP was issued to three companies that responded to the March 20, 1979, synopsis, which established April 16 as the closing date for the receipt of initial proposals.

Prior to the submission of initial proposals, four amendments were issued, essentially to furnish first-time producers requested information relevant to the technical aspects of the AN/TRC-97A radio set, and/or to allow them further time as requested to study the RFP and prepare proposals. Amendment 0001 extended the proposal due date to April 30; Amendment 0002 extended it to May 14, inter alia; Amendment 0003 revised certain specifications; and Amendment 0004 extended the date for initial proposal submission to May 31.

4360 After negotiations were conducted, by letter dated October 30 the Navy requested that best and final offers be submitted by noon on November 13. Comtech submitted its best and final offer before that time, but filed its protest in our Office shortly thereafter. Subsequently, the offers were evaluated and scored in accordance with the RFP's stated evaluation method, and a contract was awarded to Aydin Systems Division (Aydin), the only prior producer of AN/TRC-97A radio sets of the three offerors, pursuant to the authority in Defense Acquisition Regulation §§ 3-509 and 2-407.8(b)(3) (1976 ed.) to award a contract while a protest is pending.

The first article, delivery, and
progress payments provisions

The record indicates that first article approval was deemed necessary because the complexity of the items had caused design and test problems in the original development/production contract, and test and

alignment problems under the first competitive production contract (with Aydin). The record further shows that in the Navy's view the urgency of the acquisition necessitated that the production units be manufactured essentially concurrently with the first article. Thus, the initial RFP required that a first article test report be delivered within 450 days (approximately 15 months) after contract award, and that two production units be delivered the following month and four each month thereafter until all 42 units, including the first article, were delivered. Progress payments were to be made against first article costs only, and were to be limited to 10 percent of the total contract price.

On July 20, after a review of the progress of the procurement and the urgency of the Air Force's need, Amendment 0005 to the RFP was issued, modifying the delivery schedule to require that all 42 units be delivered by March 31, 1981.

The October 30 request for best and final offers included a sample contract that was to be the "vehicle" for use in submitting a best and final offer, and which changed the progress payments provision to authorize payment of costs incurred against both the first article and the production units up to 60 percent of the total contract price. The change was in response to requests made during negotiations, and the record shows that the offerors had been advised in May that such authorization was being considered.

Comtech, which has never produced AN/TRC-97A radio sets, argues that by requiring the first article and all production units to be furnished essentially at the same time with only 60 percent progress payments, the Navy unduly necessitated an offeror to commit substantial production costs without assurance that its first article would be approved. Comtech protests that the RFP thus gave Aydin a distinct competitive advantage, since, as a prior producer, that firm presumably would not need first article approval if awarded the contract

and thus could prepare a proposal without consideration of the same cost risk as a first-time producer would face.

However, section 20.2(b)(1) of our Procedures requires that a protest alleging an impropriety in an RFP be filed prior to the next closing date for the receipt of proposals after the alleged impropriety becomes apparent. Here, the basis for protest--the combination of the first article requirement, the compressed delivery schedule imposed by Amendment 0005, and the 60 percent progress payment limitation--were evident to Comtech at the latest when the firm received the request for best and final offers, since it was that request that established the subject progress payment limitation. In fact, the Navy argues that under section 20.2(b)(1) the protest should have been filed by July 30 when revised proposals in response to Amendment 0005 were due, since progress payments were at that time considerably more limited. The Navy points out that the authorization of progress payments up to 60 percent of the total contract price against both first article and production costs represented a significant increase from the initial limitation of 10 percent of total contract price against first article costs only; was done precisely to accommodate first-time producers; and Comtech was aware of the possibility of that action in late May of 1979 but failed to complain then.

Accordingly, and since as stated above the protest was not filed in our Office until after the time set by the Navy for the receipt of best and final offers, it is untimely under section 20.2(b)(1).

We note here that Comtech suggests that since the protest was filed within 10 working days after receipt of the Navy's request for best and final offers, it is timely under section 20.2(b)(2) of our Procedures, which requires that a protest be filed within 10 working days after the basis therefor is known. However, that provision by its terms

applies only to situations not addressed by section 20.2(b)(1) of our Procedures, i.e., where the protest involves something other than an alleged impropriety on the face of a solicitation.

Ambiguity as to responsibility for the cost and delivery schedule impact of revisions to Government-furnished drawings

Section F of the RFP, the Statement of Work, listed a number of drawings, engineering lists, and manuals by Military Specification number, Military Standard number, or Air Force Manual number. Section 3.8 thereof provided that "t/he contractor shall develop revisions and changes to the Government-furnished engineering drawings and associated lists, and new drawings and lists if required by engineering changes * * *."

Section J of the RFP stated that at the contractor's request the Government would furnish an AN/TRC-97A radio set acquired in an earlier procurement as a production model, and copies of technical manuals or "other printed matter." The section also provided the following disclaimer:

" * * * The Government does not represent that any of the Government furnished property meets the requirements of the contract in every respect nor does it represent that any drawings or other printed matter furnished are complete, accurate or legible * * * or that equipment made in accordance with the Government furnished property * * * will meet the performance or other requirements of this contract * * *."

Amendment 0003 added to Section J that "t/his disclaimer clause applies only to the AN/TRC-97A production model listed above under Government Property."

Comtech protests that RFP Sections F and J in combination are unclear "in that the disclaimer clause now as modified by Amendment 0003 clearly indicated the Government's lack of responsibility for the production model but did not clarify what the Government's responsibility for drawings would be in conjunction with paragraph 3.8 of the Statement of Work * * *." The protester argues:

"* * * Although Comtech has assumed that the Government will be responsible for the cost and/or schedule impact associated with any drawing changes after contract award, this issue is not entirely clear. * * * As a result of this ambiguity, there is a major question as to whether all offerors are proposing on the same basis (i.e., who is responsible for the cost of drawing revisions?)."

However, this alleged ambiguity certainly was apparent from the initial RFP, which did not address the responsibility for the cost or other impact of drawing revisions at all, or at the latest from Amendment 0003 to the extent that the asserted problem arose because that amendment only partially addressed the issue. As stated at the outset, Amendment 0003 was issued before initial proposals ultimately were due, which date was established by Amendment 0004 as May 31. Thus, under section 20.2 (b)(1) of our Procedures the protest on this issue should have been filed prior to May 31. Since it was not filed until November 13, it is untimely and not for consideration on the merits.

Comtech suggests that if the protest on either issue is determined to have been untimely filed, it should be considered under section 20.2(c) of our Procedures, which allows the consideration of untimely protests "for good cause shown" or where the protest "raises issues significant to procurement

practices or procedures." Comtech argues that its protest meets that exception to our timeliness rules in that it involves the "unfairness of * * * Government actions and the subsequent unfair advantage of first-time producers over non-first-time producers."

However, "good cause" generally refers to some compelling reason beyond the protester's control which prevented the filing of a timely protest. 52 Comp. Gen. 20 (1972). Clearly, that situation is not involved here.

In addition, significant issues contemplated by section 20.2(c) are those which involve procurement principles of widespread interest or which affect a broad class of procurements. Loud Engineering and Manufacturing, Inc., B-195189, December 27, 1979, 79-2 CPD 439. In our view, the allegations raised by Comtech as set out above do not fall within that exception.

The protest is dismissed.

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for Milton J. Socolar
General Counsel